Supreme Court, U.S.
FILED
98 577 JUL 22 1998
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OSCAR DAVID GOMEZ-OCHOA,

Petitioner,

v.

JANET RENO, as Attorney General of the United States; and ARTHUR STRAPP, District Director of the Dallas District of the Immigration and Naturalization Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend that § 242(a)(2)(C) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252 (a)(2)(C), divest U.S. Circuit Courts of Appeal of jurisdiction to review Final Administrative Removal Orders issued by District Directors of the U.S. Immigration and Naturalization Service ("INS") pursuant to INA § 238(b), 8 U.S.C. 1228(b)?

2. Did the INS District Director's erroneous determination and resulting failure to allow consideration of statutory relief, for which the Petitioner was eligible, violate Petitioner's procedural due process rights under the 14th Amendment of the Constitution of the United States?

3. Does the INS District Director's failure to consider statutory relief for which the Petitioner was eligible violate the due process rights of Petitioner and/or Petitioner's U.S. Citizen spouse and child by effectively requiring his spouse and child to either accompany the Petitioner in exile, or in the alternative, be deprived of the natural nurturing, consortium, and support a father and husband is normally expected to be able to provide?

LIST OF ALL PARTIES BELOW

The caption contains the names of all parties to the proceedings in the court of appeals.

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OPINIONS AND ORDERS BELOW

The March 11, 1998 order of the United States Court of Appeals denying Petitioner's motion for stay of deportation and granting Respondent's motion to dismiss Petitioner's petition for review appears in the appendix hereto, App. 1. The April 24, 1998 order denying Petitioner's motion for reconsideration appears in the appendix hereto, App. 9.

BASIS FOR JURISDICTION IN THIS COURT

The United States Court of Appeals for the Fifth Circuit granted Respondents' motion to dismiss Petitioner's petition for review and denied Petitioner's motion for stay of deportation on March 11, 1998. Subsequently, Petitioner filed in the Fifth Circuit a motion to reconsider which was denied April 24, 1998. This Court has jurisdiction to review the Fifth Circuit's dismissal of Petitioner's motion for stay of deportation and petition for review pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 8 U.S.C. § 1252(a)(2)(C), Section 242(a)(2)(C) of the Immigration and Nationality Act, which provides that:

> "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 237(a)(2)(A)(iii) [an aggravated felony], . . ."

and, 8 U.S.C. § 1228(b)(3), Section 238(b)(3) of the Immigration and Nationality Act, which provides that:

> "The Attorney General may not execute any order described in paragraph (1) [a final administrative removal order charging deportability under § 237(a)(2)(A)(iii) of the Act] until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 242."

and, 8 U.S.C. § 1182(h), Section 212(h) of the Immigration and Nationality Act, which provides that:

> "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States."

STATEMENT OF THE CASE

Petitioner appeals the decision of the court below dismissing Petitioner's motion for stay of deportation and petition for review.

The facts in this case are not in dispute. Petitioner is a native and citizen of Mexico. He is married to a U.S. citizen and has a minor U.S. citizen child born of said marriage. On March 26, 1996, Petitioner pled guilty in the District Court of Tulsa County, Oklahoma, to the

misdemeanor offense of Obtaining Merchandise Under False Pretense in violation of Oklahoma Statutes. A suspended sentence of one (1) year and a $250.00 fine was imposed. Petitioner has no prior criminal record except for the foregoing misdemeanor conviction.

Petitioner subsequently applied to the U.S. Immigration and Naturalization Service ("INS") for permanent resident status. Petitioner's application was denied by the INS because of this conviction. Even though the conviction is a misdemeanor offense under Oklahoma law, it is classified as an aggravated felony pursuant to § 101(a)(43) of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. § 1101(a)(43). On January 6, 1998, the INS placed Petitioner in removal proceedings by serving him with a Notice of Intent to Issue a Final Administrative Removal Order ("Notice") pursuant to § 238(b) of the Act, 8 U.S.C. § 1228(b). This Notice charged Petitioner with deportability under § 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) which provides that an alien convicted of an "aggravated felony" is removable ("deportable") from the United States. This Notice further informed the Petitioner he "may seek judicial review of any final administrative removal order by filing a petition for review within 14 calendar days after the date such final administrative removal order is issued, . . ." (App. 4).

On February 4, 1998, the INS served Petitioner with a Final Administrative Removal Order ("Order") which had been signed by the INS Dallas District Director on January 28, 1998. This relatively new and summary administrative procedure was instituted, and the order predicated upon, the District Director's erroneous determination that Petitioner was "ineligible for any

relief from removal." (App. 6). Petitioner is statutorily eligible to apply for relief from removal under § 212(h) of the Act, 8 U.S.C. § 1182(h). This erroneous determination permitted the District Director to retain exclusive administrative jurisdiction, thereby precluding Petitioner from pursuing statutory relief in, and/or administrative review by, the Executive Office of Immigration Review ("Immigration Court").

A. The Decision of the Court of Appeals

On February 17, 1998, Petitioner filed a Petition for Review pursuant to § 238(b)(3) of the Act, 8 U.S.C. § 1228(b)(3) requesting the United States Court of Appeals for the Fifth Circuit review this Administrative Order. Petitioner also requested stays of deportation from both the Fifth Circuit and the District Director pending final disposition of his judicial appeal. In particular, Petitioner requested the termination or vacation of the District Director's Administrative Removal Order and a transfer of the proceedings to the Immigration Court. This would have permitted an Immigration Judge to hear and adjudicate a waiver application by Petitioner for statutory relief for which he was and is eligible.

Without responding to Petitioner's petition for review, the Respondents: (1) moved to summarily dismiss Petitioner's petition for review asserting the Fifth Circuit lacked jurisdiction to review a final administrative removal order, (2) opposed Petitioner's motion for a stay of deportation, and (3) moved to defer filing of the administrative record. The Fifth Circuit granted Respondent's motion to dismiss Petitioner's motion for stay of

deportation, and his petition for review on March 11, 1998. The court did so without the benefit of a response from Petitioner. Subsequently, Petitioner filed a motion in the Fifth Circuit to reconsider their decision which was denied on April 24, 1998.

The INS then denied Petitioner's separate request for an administrative stay and deported the Petitioner from the United States.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted for the following reasons: Although Petitioner does not dispute Congress' authority to define the jurisdiction of federal courts within constitutional limits, Petitioner disagrees with the Fifth Circuit's position that § 242(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(C), divests that court of jurisdiction to review the INS's Final Administrative Removal Order issued by the Dallas District Director in the instant case; and Petitioner further asserts that he, and by derivation, his U.S. citizen spouse and minor child, have been denied due process of law.

A. It Is Uncertain Whether Congress Intended to Preclude U.S. Circuit Courts of Appeal from Reviewing INS Final Administrative Removal Orders Issued by INS District Directors.

Congress has stated that all agency actions are presumed to be reviewable "except to the extent that . . . a statute precludes judicial review." Administrative Procedure Act, 5 U.S.C. § 701(a)(1) (1997). For a statute to preclude judicial review, there must be clear and

convincing evidence Congress intended to foreclose reviewability of an agency action. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). If the statute is ambiguous as to whether Congress intended to foreclose reviewability of an agency action, then a court should defer to the agency interpretation of the statute. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). However, the Supreme Court has held that there is a presumption that statutes be construed to permit judicial review of agency actions. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). If the agency's interpretation of the statute is contrary to Congressional intent, then the agency's interpretation must be rejected. *Chevron*, 467 U.S. at 843, *supra*.

In the instant case, apparently because of flawed legislative draftsmanship, it is neither apparent or readily discernible Congress intended to preclude U.S. Circuit Courts of Appeal from reviewing final administrative removal orders issued by INS District Directors. On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009 ("IIRAIRA"), which simultaneously amended INA § 238(b)(3), and added INA § 242(a)(2)(C). Section 242(a)(2)(C) provides:

> "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 237(a)(2)(A)(iii) [an aggravated felony], . . ."

While INA § 242(a)(2)(C) indicates Congress did not intend to allow judicial review by U.S. Circuit Courts of

Appeal of final removal orders, INA § 238(b)(3) clearly and unambiguously indicates a completely contrary intent by Congress to provide for judicial review of final administrative orders of removal issued by INS District Directors.[1] INA § 238(b)(3) provides:

> "The Attorney General may not execute any order described in paragraph (1) [a final administrative removal order charging deportability under § 237(a)(2)(A)(iii) of the Act] until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 242."

Indeed, Congress' intent to provide for judicial review under INA § 238(b)(3) by U.S. Circuit Courts of Appeal of final administrative removal orders issued by INS District Directors is further bolstered by the fact, INA § 238(b)(4)(E) directs the Attorney General to ensure that "a record is maintained for judicial review."

The INS' interpretation that INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) divests Circuit Courts of jurisdiction to review a final administrative removal order issued by a District Director should be rejected. Otherwise, it would render meaningless the judicial review specifically granted by § 238(b)(3) of the Act. Further, the INS's assertion is contra to the language contained

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[1] Unlike an "administrative" order of removal made by a District Director pursuant to INA §238(b)(3), virtually all removal orders entered by Immigration Judges are subject to an administrative appeal to the Board of Immigration Appeals pursuant to 8 CFR § 3.1(b). The INS is apparently maintaining there is no appeal, administrative or judicial, from a District Director's removal order.

in the Notice of Intent to Issue a Final Administrative Order the INS served upon Petitioner.[2] Indeed, even though the INS has subsequently changed its original implementing regulation, the current regulation still expressly prohibits the execution of a Warrant of Removal until at least 14 days after the District Director's final administrative order is issued.[3] Presumably the INS is attempting to avoid invalidating administrative removal orders entered by District Directors from which other aliens fail to appeal should INS' position ultimately not prevail in this court.

It is difficult for Petitioner to ascertain exactly what the government's current position is concerning this issue because the Executive Office for United States' Attorneys in the U.S. Department of Justice ("Executive Office") published an article in *46 United States Attorney's Bulletin 9* (January 1998), which was reprinted in Bender's Immigration Bulletin, Vol. 3, No. 8 (April 15, 1998). This article contained the following representations:

> The position of the Civil Division's Office of Immigration Litigation (OIL) is that the *Yesil* and *Mojica* decisions are incorrect, and that

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[2] The Notice of Intent to Issue a Final Administrative Order issued by the INS and served upon Petitioner provides as follows (App. 4):

> "You may seek judicial review of any final administrative removal order by filing a petition for review within 14 calendar days after the date such final administrative order is issued, or you may waive such appeal by stating, in writing, your desire not to appeal."

[3] 8 C.F.R. § 238.1(f) (1997).

district courts now generally have no role to play in the review of immigration matters. In cases arising under AEDPA and IIRAIRA, OIL has taken the position that the AEDPA and IIRAIRA judicial review provisions do not preclude the courts of appeals from reviewing substantial constitutional challenges to orders of removal, even for criminal aliens. OIL's position is that such review easily satisfies the minimal level of judicial review required by Article 1, clause 2 of the Constitution, which prohibits suspension of the writ of habeas corpus. OIL's position relies, in part, on the canon of statutory interpretation set fort by the Supreme Court in *Webster v. Doe,* 486 U.S. 592 (1988), whereby the courts will not presume that Congress intended to preclude judicial review of constitutional claims absent a clear expression of Congressional intent to do so. Neither AEDPA nor IIRAIRA expressly state that a criminal alien's constitutional claims cannot be reviewed in the courts of appeals; in fact, a new provision effective for aliens placed into removal proceedings after April 1, 1997, states that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section."[4]

Further, while the purpose behind INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) was apparently intended to curtail dilatory tactics which allowed deportable aliens

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[4] INA § 242(b)(9), 8 U.S.C. § 1252(b)(9)

to prolong their removal, the Fifth Circuit's refusal to review Petitioner's final administrative removal order when he is statutorily eligible for relief from removal, would nullify and render this statutory waiver provision of INA § 212(h) worthless.[5]

B. The INS District Director's Refusal to Allow Petitioner to Apply for Discretionary Statutory Relief for Which He Is Eligible Violates Due Process.

The INS District Director violated Petitioner's due process rights when he was not allowed to apply for relief from removal. The INS Dallas District Director erroneously determined and made the finding in his administrative order that Petitioner was:

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[5] Section 212(h) of the Act, 8 U.S.C. § 1182(h), as amended by section 348(a) of the Illegal Immigration and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 ("IIRIRA"), limits statutory eligibility to apply for a waiver in certain cases, providing in pertinent part as follows:

> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

The Petitioner has not ever been admitted to the United States as a permanent resident.

"ineligible for any relief from removal . . ." (App. 6).

However, Petitioner in fact was statutorily eligible for relief at the time of his deportation hearing under § 212(h) of the Act, 8 U.S.C. § 1182(h). The Executive Office for Immigration Review Board of Immigration Appeals affirmed that an alien in virtually identical circumstances was "statutorily eligible for a § 212(h) waiver." See *In re Michel*, Interim Decision 3335 (BIA 1998).

Petitioner was never given the opportunity to apply for INA § 212(h) relief from removal. Case law provides, "when intervening law renders an alien eligible for discretionary relief for which alien was ineligible at the time of his deportation hearing, the proper remedy is . . . for a remand to an immigration judge so that the alien may file an application [for discretionary relief]." *Valderrama-Fonseca v. INS*, 116 F.3d 853, 857 (9th Cir. 1997). Therefore, Petitioner was deprived of the procedural due process to which he was entitled. *See Bustos-Torres v. INS*, 898 F.2d 1053, 1054 (5th Cir. 1990); *Reno v. Flores*, 507 U.S. 292, 306 (1993); and *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903) ("it is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

CONCLUSION

The Fifth Circuit has jurisdiction to vacate the INS's administrative order and remand the proceedings to permit an immigration judge to hear and adjudicate Petitioner's eligibility for discretionary relief from

deportation pursuant to § 212(h) of the Act, 8 U.S.C. § 1182(h).

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

App. 1

[Dated March 11, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60073

OSCAR DAVID GOMEZ-OCHOA

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

Before SMITH, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for stay of deportation is DENIED.

IT IS FURTHER ORDERED that respondent's motion to dismiss the petition for review for lack of jurisdiction is GRANTED.

IT IS FURTHER ORDERED that respondent's motion to defer the filing of the administrative record, 30 days for the court's ruling on the motion to dismiss, is DENIED AS MOOT.

App. 2

[Dated January 6, 1998]

U.S. Department of Justice

Immigration and Naturalization Services

Notice of Intent to Issue a Final Administrative Removal Order

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In removal proceedings under section 238(b) of the Immigration and Nationality Act

File No. A74 099 660

To: GOMEZ-OCHOA, Oscar David
Address: IN SERVICE CUSTODY OKLAHOMA CITY OK
(Number, Street, City, State, and ZIP code)

Telephone: _____
(Area code and phone number)

Pursuant to section 238(b) of the Immigration and Nationality Act (Act), 8 USC 1228(b), the Immigration and Naturalization Service (Service) has determined that you are amenable to expedited administration removal proceedings. The determination is based on the following allegations:

1. You are not a citizen or national of the United States.
2. You are a native of Mexico and a citizen of MEXICO.
3. You entered the United States (at)(near) LAREDO, TEXAS on or about 01/06/1994.
4. At the time you entered YOU WERE NOT THEN ADMITTED/PAROLED BY AN IMMIGRATION OFFICER.

5. You are not lawfully admitted for permanent residence.
6. You were, on 03/22/1996, convicted in the DISTRICT Court TULSA COUNTY, OKLAHOMA for the offense of OBTAIN MERCH BY FALSE PRETENSE in violation of TITLE 21 SECT. 1542 OF THE OKLAHOMA STATUTES for which the term of imprisonment imposed was ONE (1) YEAR.

Charge:
You are deportable under section 237(a)(2)(A)(iii) of the Act. 8 USC 1227(a)(2)(A)(iii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43) of the Act. 8 USC 1101(a)(43).

Based upon section 238(b) of the Act, the Service is serving upon you this NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER ("Notice of Intent") without a hearing before an Immigration Judge.

Your Rights and Responsibilities
You may choose to be represented (at no expense to the United States government) by counsel, authorized to practice in this proceeding. If you wish legal advice and cannot afford it, contact legal counsel from the list of available free legal services provided to you.

You must respond to the above charges in writing to the Service address provided below within 10 calendar days of service of this notice (or 13 calendar days if service is by mail). In your response you may request, for good cause, an extension of time: rubut the charges stated above (with supporting evidence); request an opportunity to review the government's evidence; admit deportability; and/or designate the country to which you

choose to be removed in the event that a final order of removal is issued (which designation the Service will honor only to the extent permitted under section 241 of the Act).

You may seek judicial review of any final administrative order by filing a petition for review within 14 calendar days after the date such final administrative order is issued, or you may waive such appeal by stating, in writing, your desire not to appeal.

s/s Stephen C. Merrill
(Signature and title of issuing officer)

OKLAHOMA CITY, OK
(City and state of issuance)

1/6/98
(Day and time)

App. 5

Certificate of Service

I served this Notice of Intent. I have determined that the person served with this document is the above named individual.

s/s OFFICER
(Signature and title of officer)

1/6/98, Person
(Date and manner of service)

☒ I explained and/or served this Notice of intent to the alien in the Spanish/English language.

Name of Interpreter _____

Location/Employer _____

[Signed January 28, 1998]

Department of Justice
Immigration and Naturalization Service

Final Administrative Removal Order

FINAL ADMINISTRATIVE REMOVAL ORDER
UNDER SECTION 238(b) OF THE
IMMIGRATION AND NATIONALITY ACT

File No: A 74 099 660

Date: January 18, 1998

To: Oscar David GOMEZ-Ochoa
Address: In Service Custody, Oklahoma City, Oklahoma
(Number, street, city, state, and ZIP code)

Telephone: _____
(Area code and phone number)

ORDER

Based upon the allegations set forth in the Notice of Intent to Issue a Final Administrative Removal Order and evidence contained in the administrative record, I, the undersigned Deciding Service Officer of the Immigration and Naturalization Service, make the following findings of fact and conclusions of law. I find that you are not a citizen or national of the United States and that you were not lawfully admitted for permanent residence. I further find that you have a final conviction of an aggravated felony as defined in section 101(a)(43) of the Act, 8 U.S.C. 1101(a)(43), and are ineligible for any relief from removal that the Attorney

General may grant in an exercise of discretion. I further find that the administrative record established by clear, convincing, and unequivocal evidence that you are deportable as an alien convicted of an aggravated felony pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii). By the power and authority vested in the Attorney General and in me as the Attorney General's delegate under the laws of the United States, I find you deportable as charged and order that you be removed from the United States to Mexico or to any alternate country prescribed in section 241 of the Act.

/s/ Arthur E. Strapp
(Authorized INS official)
ARTHUR E. STRAPP
DISTRICT DIRECTOR
(Title of Official)
January 28, 1998
Dallas, Texas
(Date and Office Location)

Petition for review: ☐ Waived by respondent.
☒ Reserved by respondent.

App. 8

Certificate of Service

I served this FINAL ADMINISTRATIVE REMOVAL ORDER upon the above named individual.

02/04/98, 0830 HRS, Oklahoma City, Personal
(Date, time, place, and manner of service)

/s/ Deportation Officer
(Signature and title of officer)

App. 9

[Dated April 24, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60073

OSCAR DAVID GOMEZ-OCHOA

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

Before SMITH, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for reconsideration of the court's order entered March 11, 1998 is DENIED.